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IN THE
COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

CRYSTAL MASON,

Appellant,

v.

STATE OF TEXAS,

Respondent.

From the Second Court of Appeals,
Cause No. 02-18-00138-CR

Trial Court Cause No. 148710D
From the 432nd District Court of Tarrant County, Texas
The Honorable Ruben Gonzalez, Jr. Presiding

BRIEF OF FORMER PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT CRYSTAL MASON

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**Pro Hac Vice Application Pending*

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are former prosecutors and officials who are committed to the integrity of the justice and elections systems. *Amici* take seriously the vision of a prosecutor articulated by Justice Robert Jackson in an address he delivered while serving as the Attorney General of the United States: that prosecutors should be "diligent, strict, and vigorous in law enforcement," but above all, should "be just" and approach their "task with humility." Robert H. Jackson, "The Federal Prosecutor," Remarks Delivered at the Second Annual Conference of United States Attorneys at 3, 7 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/-legacy/2011/09/16/04-01-1940.pdf.

This brief highlights certain foundational principles of criminal prosecution, which reinforce Appellant's merits arguments—including interpreting criminal prohibitions narrowly, in light of the rule of lenity, and consistent with the protections of federal voting laws. *Amici* file this brief out of concern that prosecuting the submission of a provisional ballot by someone who incorrectly believes they are eligible to vote is inconsistent both with Texas's illegal voting statute and with the fundamental principles of prosecutorial discretion, such that leaving Appellant's conviction undisturbed could seriously undermine public trust

in the criminal justice system.[1]

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Gregory A. Brower served as Assistant Director and Deputy General Counsel of the Federal Bureau of Investigation from 2016 to 2018; U.S. Attorney for the District of Nevada from 2008 to 2009; and Inspector General of the U.S. Government Publishing Office from 2004 to 2006.

Paul Coggins served as the U.S. Attorney for the Northern District of Texas from 1993 to 2001, and was twice appointed as Special Assistant Attorney General for Texas.

John Farmer has been an Assistant U.S. Attorney, New Jersey Attorney General, Senior Counsel to the 9/11 Commission, Dean of Rutgers Law School, and now serves as Director of the Eagleton Institute of Politics. He has also served on New Jersey's Executive Commission on Ethical Standards, Advisory Committee on Judicial Conduct, and the State Commission of Investigations.

[1] No fees have been or will be paid for the preparation and filing of this amicus brief. *See* Tex. R. App. P. 11.

Jonathan S. Feld served as an Associate Deputy Attorney General at the U.S. Department of Justice; Assistant U.S. Attorney for the District of New Jersey; Assistant Special Counsel to the Select Commission established by the State of Rhode Island to investigate the collapse of its privately-insured financial institution system; and Associate Independent Counsel for the investigation of the U.S. Department of Housing and Urban Development.

Sarah R. Saldaña served as the U.S. Attorney for the Northern District of Texas (Dallas) from 2011 to 2014 and was appointed to the Attorney General's Advisory Committee during her tenure. Since 2004, she had served as an Assistant U.S. Attorney in the same office, both as a line prosecutor, including service as the District's Election Officer, and as Deputy Criminal Chief of the Major Fraud and Public Corruption unit. Most recently, she served as Director of U.S. Immigration and Customs Enforcement from 2014 to 2017.

Richard H. Stephens served as Interim U.S. Attorney (twice), First Assistant U.S. Attorney and Chief of the Criminal Division of the U.S. Attorney's Office for the Northern District of Texas. In addition, he served as Assistant District Attorney for Dallas County, Texas.

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William F. Weld served as the U.S. Attorney for Massachusetts from 1981 to 1986; as the Assistant U.S. Attorney General in charge of the Criminal Division from 1986 to 1988; and as Governor of Massachusetts from 1991 until 1997.

Grant Woods served as Attorney General of Arizona from 1991 to 1999. General Woods was President of the Conference of Western Attorneys General and chaired the Civil Rights and Supreme Court committees for the National Association of Attorneys General.

INTRODUCTION

Prosecutors wield tremendous power. The impact of their decisions regarding whether and how to seek to curtail individuals' liberty can reverberate well beyond the specifics of any given case, in ways both positive and destructive. Appropriately, our system imposes important checks on this power to help ensure it is used only to further the aims of justice. This Court's review of Appellant Crystal Mason's conviction for illegal voting is one such check.

Ms. Mason's prosecution was far outside the bounds of any reasonable exercise of the prosecutorial power.

First, the conduct for which Ms. Mason was charged and convicted—submitting a provisional ballot with the ultimately incorrect belief that she was eligible to vote—is not prohibited under Texas's illegal voting statute. That statute targets actual fraud and requires knowledge of ineligibility to vote—a requirement that is clear from the plain text and confirmed by legislative intent and a recent decision from this Court interpreting a similar statute.

Second, prosecuting Ms. Mason's conduct as illegal voting is incompatible with the provisional ballot regime created by the Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. § 20901 *et seq.*, a federal voting law enacted with overwhelming bipartisan support. HAVA encourages the use of provisional ballots when individuals are uncertain about whether they are eligible to vote and

establishes the remedy for when they turn out to be ineligible: not counting the submitted ballot.

Third, Ms. Mason's prosecution was inconsistent with fundamental principles of prosecutorial discretion and stands as an extreme outlier prosecution. Charging and convicting her of illegal voting ignored available and satisfactory alternative sanctions and chills others from exercising their fundamental right to vote through the provisional ballot system.

By upholding Ms. Mason's conviction, the court of appeals allowed the prosecution to improperly expand its authority and effectively rewrite the illegal voting statute. Fortunately, this Court can remedy that error by holding that the illegal voting statute, properly interpreted, does not permit Ms. Mason's conviction.

ARGUMENT

I. The Illegal Voting Statute Does Not Prohibit the Submission of a Provisional Ballot by An Individual Who Incorrectly Believes They Are Eligible to Vote.

Ms. Mason's conviction is fundamentally at odds with the plain language and intent of the illegal voting statute, Tex. Election Code § 64.012(a)(1), which does not prohibit a person from submitting a provisional ballot when they do not know that they are ineligible to vote. To leave Ms. Mason's conviction undisturbed would permit prosecutors to effectively step into the shoes of Texas legislators and rewrite

the law, transforming a statute targeting intentional fraud into a sweeping criminalization of good faith efforts to participate in the democratic process.

The illegal voting statute provides that a person commits the offense of illegal voting, a second-degree felony, "if the person votes or attempts to vote in an election in which the person knows the person is not eligible to vote." Tex. Elec. Code § 64.012(a)(1). The plain language of the statute thus requires the State to prove that an individual knew she was not eligible to vote when she voted or attempted to vote. The mere fact of voting or attempting to vote while ineligible to do so is not enough. Nor is it enough that the person knows the underlying fact that makes them ineligible. They must know the relationship between that fact and their eligibility to vote—*i.e.*, they must know that they are not eligible to vote. Had the Legislature intended a different result, it would not have required knowledge that one "is not eligible to vote."

Representative Briscoe Cain, the Chair of the Texas House Elections Committee, recently confirmed this plain language reading of the statute. *Cf. Tapia v. United States*, 564 U.S. 319, 331-32 (2011) (using legislative history to corroborate and fortify the Court's reading of the text); *Carr v. United States*, 560 U.S. 438, 457-58 (2010) (same). In May 30, 2021 remarks to the House Chamber in support of an elections bill he was championing, Representative Cain explained that one provision of the new bill would "clarify what some courts and local

prosecutors have gotten wrong" about the existing illegal voting statute. *See* Decl. of Julie Veroff, Ex. A at 2. That error, he said, is that

> [t]he crime of illegal voting is intended to target those individuals who intentionally try to commit fraud in our elections by voting when they know they are not eligible to vote. It is not intended to target people who make innocent mistakes about their eligibility, that are facilitated solely by being provided a provisional ballot by a judge.

Id. Representative Cain emphasized that the clarifying language he proposed in the new bill did "not actually change existing law, but rather [] makes crystal clear that under current law, when an individual fills out a provisional ballot, like tens of thousands of Texans do every year, the mere fact that they filled out and signed a provisional ballot affidavit is not enough to show that an ineligible voter knew they were ineligible to vote" and thus is not enough to violate the illegal voting statute. *Id.* "[N]o one should be prosecuted solely on the basis of filling out a provisional ballot affidavit," he stressed. "[P]eople who in good faith cast [a] provisional ballot, but turn out to be mistaken, cannot and should not be prosecuted. Such a prosecution . . . would . . . be a grave error." *Id.* at 3.

The plain language reading of the illegal voting statute finds further support in this Court's decision in *DeLay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014). *DeLay* considered the mental state required to violate Section 253.003(a) of the Election Code, which provides: "A person may not knowingly make a political contribution in violation of this chapter." Tex. Elec. Code § 253.003(a); *DeLay*, 465

S.W.3d at 239 n.17. After observing that it was "not at all clear how far down the sentence the word 'knowingly' is intended to travel," this Court concluded that, "as written, Section 253.003(a) requires that the actor be aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, but also of the fact that undertaking the conduct under those circumstances in fact constitutes a 'violation of' the Election Code." *DeLay*, 465 S.W.3d at 250 (quoting *Liparota v. United States*, 471 U.S. 419, 424 n.7 (1985)).[2] "Moreover," *DeLay* explained, "the rule of lenity applies" to "penal provisions that appear outside the Penal Code . . . ." *Id.* at 251.

The court of appeals failed to adequately confront and apply *DeLay* here. It addressed the decision only in a footnote and attempted to distinguish *DeLay*'s holding that knowledge of illegality was required by noting that the illegal contribution statute's use of "knowingly" was ambiguous, whereas the illegal voting statute's use of "knows" is not. *See Mason v. State*, 598 S.W.3d 755, 769 n.12 (Tex. App.—Fort Worth 2020) (stating that in the illegal contribution statute, "knowingly" appeared "before both the verb describing the actus reas and the following clause describing the actus reas," whereas the illegal voting statute "places the word 'knows' after the actus-reas verb and immediately before the word describing the

[2] *DeLay* further clarified that "neither recklessness nor negligence" are sufficient *mens rea* to show actual knowledge of illegality. 465 S.W.3d at 252.

attendant circumstances—'ineligible'"). But the court of appeals never explained why the ambiguity of the statute at issue in *DeLay* allowed it to disregard *DeLay*'s determination of what it means to "knowingly" violate the Election Code. 465 S.W.3d at 250. Indeed, the illegal voting statute at issue here is even more straightforward than the illegal contribution statute at issue in *DeLay* (because here there is no question about what part of the statute the knowledge requirement modifies), providing all the more reason for this Court to apply *DeLay*'s reasoning that the "knowledge" required is that of the illegal nature of the conduct.

Mr. DeLay and Ms. Mason present many contrasts as individuals—for one, the former is a sophisticated political actor with powerful political connections, and the latter is not—but the legal principle in both their cases is the same. As a matter of textualism, the statutory requirement that a person knowingly violate the Election Code means that a person must know that their conduct violates the Election Code. There cannot and should not be two systems of justice where the same underlying principle applies equally: if Mr. DeLay prevailed in challenging his conviction, so should Ms. Mason.

At the same time that it ignored *DeLay*'s clear application, the court of appeals relied on cases that, unlike here, involved an actual intent to undermine the integrity of an election to advance personal political goals. *See Mason*, 598 S.W.3d at 768-69 (citing *Medrano v. State*, 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref'd);

Jenkins v. State, 468 S.W.3d 656 (Tex. App.—Houston [14th Dist.] 2015), *pet. dism'd improvidently granted*, 520 S.W.3d 616 (Tex. Crim. App. 2017) (per curiam); *Heath v. State*, No. 14-14-00532-CR, 2016 WL 2743192 (Tex. App.—Houston [14th Dist.] May 10, 2016, pet. ref'd) (mem. op., not designated for publication)). In *Medrano*, a case that preceded *DeLay*, a candidate for local office asked his niece to lie about her address on her voter registration card and again at the polling place so that she could vote for him in the precinct where he was running. 42 S.W.3d at 873-74. The court of appeals held that "there was sufficient evidence from which the trial court could have found beyond a reasonable doubt that [the niece]" subjectively knew that she was not eligible to vote in her uncle's race. *Id.* at 885-86. And in *Jenkins*, which post-dated but did not discuss *DeLay*, a "politically active" individual wanted to vote in an election for the board members of a nearby utility district, where he did not live. 468 S.W.3d at 658-59. In coordination with several other individuals who likewise wanted to influence the leadership of the utility district, he changed his address on his voter registration from the residence where he had lived for nearly 20 years to a hotel in the utility district where he had never before stayed. *Id.* at 660. He then rented a room at that hotel on the eve of the election and voted. *Id.* at 662. *Heath* involved the same scheme as *Jenkins*. In stark contrast to these cases, Ms. Mason was not trying to advance her own political fortunes or interests or undermine the integrity of an election. She went to vote

because her mother encouraged her to do so and she did not know she was ineligible to vote. *See* 2RR116, 143.

Thompson v. State, 9 S.W. 486 (Tex. Ct. App. 1888), another case on which the court of appeals relied, *see Mason*, 598 S.W.3d at 768, is an outdated one-paragraph opinion with reasoning that has long been criticized. *See* George Wilfred Stumberg, *Mistake of Law in Texas Criminal Cases*, 15 Tex. L. Rev. 287, 297 n.34 (1937) (calling *Thompson* "unsound"). The Court should decline to extend *Thompson*'s flawed reasoning here, as it did not involve a provisional ballot and preceded HAVA's creation of the modern provisional balloting system by more than a century. And in any event, this Court can and should reject *Thompson* altogether, as it is inconsistent with fundamental criminal law principles, unpersuasive, and in serious tension with *DeLay* and HAVA. *See Vega v. State*, 84 S.W.3d 613, 625 (Tex. Crim. App. 2002) (explaining that "overruling precedent is acceptable" "when the original rule is flawed from the outset" and "when the rule consistently creates unjust results").

Thus, as a matter of plain language, confirmed by legislative intent and recent, analogous case law, the illegal voting statute clearly requires knowledge of ineligibility to vote. But if this Court concludes that there is any ambiguity, the rule of lenity requires that ambiguity be resolved in favor of non-prosecution. *See* Tex. Gov't Code § 311.035(b)(1) ("[A] statute or rule that creates or defines a criminal

offense or penalty shall be construed in favor of the actor if any part of the statute or rule is ambiguous on its face or as applied to the case, including . . . an element of offense."). Accordingly, this Court has "typically resolved ambiguities with respect to the scope of the applicable *mens rea* in favor of making sure that mental culpability extends to the particular circumstance that renders otherwise innocuous conduct criminal." *DeLay*, 465 S.W.3d at 251. This presumption is especially strong when the criminal statute at issue is outside the penal code. *State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007) ("[C]riminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused."); *DeLay*, 465 S.W.3d at 251 (similar). Hence, as in *DeLay*, to the extent there is any ambiguity here, the rule of lenity requires the statute's knowledge element to be construed in Ms. Mason's favor.

* * *

As Representative Cain confirmed less than two months ago, the illegal voting statute prohibits efforts to corrupt our democratic system, not good faith efforts to participate in it. Requiring knowledge of ineligibility to vote was a critical way for the Legislature to distinguish between corruption and mistake. Whereas efforts to corrupt the election process, if left unchecked, threaten to erode public trust and undermine our democracy, submitting a provisional ballot with an ultimately incorrect belief about eligibility does not. The court of appeals' decision turns this

logic on its head, threatening to punish the tens of thousands of Texans who, like Ms. Mason, seek to perform their civic duty and participate in our democratic process but are ultimately incorrect about their eligibility to vote. This Court should repair that grave error, apply the plain language of the statute, and hold that the illegal voting statute does not prohibit submitting a provisional ballot where there is no knowledge of ineligibility to vote.

II. Prosecuting the Submission of a Provisional Ballot by an Individual Who Incorrectly Believes They Are Eligible to Vote Is Incompatible with the Provisional Ballot Regime Created by the Help America Vote Act of 2002.

Properly reading the illegal voting statute not to criminalize the submission of a provisional ballot by someone who incorrectly believes they are eligible to vote also harmonizes state law with HAVA, an overwhelmingly bipartisan federal voting law signed by President George W. Bush. Ms. Mason's prosecution and conviction is disruptive of and incompatible with HAVA's provisional balloting regime.

HAVA was enacted to encourage the use of provisional ballots when individuals are uncertain about whether they are eligible to vote. Congress had found, based on "[s]tudies of the nation's election system," that voters were experiencing "a significant problem"—they were "arriv[ing] at the polling place believing that they [were] eligible to vote, and then [being] turned away because the election workers [could not] find their names on the list of qualified voters." H.R. Rep. 107-329 at 38 (2001), https://www.congress.gov/107/crpt/hrpt329/CRPT-

107hrpt329.pdf. To alleviate that problem, HAVA "creat[ed] a system for provisional balloting, that is, a system under which a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote." *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004). In so doing, Congress recognized that "provisional voting is necessary to the administration of a fair, democratic, and effective election system, and represents the ultimate safeguard to ensuring a person's right to vote." H.R. Rep. 107-329 at 37.

The very design of the provisional ballot system contemplates that people will sometimes be wrong about their eligibility to vote, and provides that the remedy in such situations is not counting the ballot. *See Sandusky*, 387 F.3d at 570; 52 U.S.C. § 21082(a)(4) (providing that provisional ballots are counted only upon a determination of eligibility). And indeed, mistakes about eligibility are typically made by people just like Ms. Mason—"citizens rendered ineligible by criminal conviction." Justin Levitt, *The Truth About Voter Fraud*, Brennan Center for Justice at 11 (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf. These mistakes are unsurprising because the laws governing eligibility for people with criminal convictions "can be confusing." *Id.* They "vary from state to state," and "different voters are disenfranchised for different convictions for different lengths of time." *Id.* Moreover, "the process of

restoring a citizen's right to vote varies." *Id*. And prospective voters are not the only ones who find these rules difficult to navigate. Even "election officials with special training in the rules and regulations governing eligibility routinely get the law wrong." *Id*. Surveys of local election officials in New York and New Jersey in 2003 and 2004, for example, found that about 40% of officials were not following state law when it came to restoring the right to vote for those citizens with criminal convictions. *Id*.

Consistent with HAVA's framework, Ms. Mason's provisional ballot was not counted as a vote. RR3.Ex.6. Going well beyond that congressionally approved remedy and prosecuting her for illegal voting defies the core idea of the provisional ballot system that Congress created with HAVA. Fortunately, the proper interpretation of the illegal voting statute does not permit that result.

III. This Prosecution Is Unwarranted.

Prosecuting the submission of a provisional ballot by someone who incorrectly believes they are eligible to vote is inconsistent with the proper interpretation of the illegal voting statute and fundamental principles of prosecutorial discretion. Ms. Mason's prosecution undermines public trust in the law and in those making prosecutorial decisions.

Prosecutors have tremendous power. Justice Jackson, in an address given while he served as Attorney General, emphasized the role of the prosecutor as having

"more control over life, liberty, and reputation than any other person in America." Robert H. Jackson, "The Federal Prosecutor," Remarks Delivered at the Second Annual Conference of United States Attorneys at 1 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf. Given that power, the fundamental object of criminal prosecution must be to seek justice. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (underscoring that the prosecution's interest "is not that it shall win a case, but that justice shall be done").

Prosecutorial policy manuals affirm the guiding principles of humility, integrity, and appropriate use of discretion. *See* Am. Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-1.2(b) (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (stating the prosecutor's duty is "to seek justice within the bounds of the law, not merely to convict"); U.S. Dep't of Justice, *Justice Manual: Principles of Federal Prosecution*, Section 9-27.200 (2018), https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution (counseling that prosecution is not "automatically warrant[ed]" whenever probable cause can be shown and that prosecutors must account for "all relevant considerations," including the availability of an adequate, non-criminal alternative to prosecution).

In addition to these core principles, prosecutions of electoral crimes warrant special considerations and limitations because true electoral crimes are an affront to

our collective self-governance. Misguided prosecutions targeting innocent efforts at electoral participation can have serious chilling effects. Accordingly, the United States Department of Justice has underscored, in the context of election-related offenses, that "prosecution is most appropriate when the facts demonstrate that the defendant's objective was to corrupt the process by which voters were registered, or by which ballots were obtained, cast, or counted." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* at 10 (8th ed. 2017), https://www.justice.gov/criminal/file/1029066/download. Furthermore, the *Guide* notes that mistakes "in the election process" can often be redressed through non-criminal avenues. *Id.*

Prosecuting an ultimately incorrect submission of a provisional ballot constitutes an extreme abuse of prosecutorial discretion. To start, Ms. Mason's prosecution was not necessary to remedy any harm caused. A satisfactory alternative for penalizing ineligible voters already exists outside the criminal justice system. Namely, under HAVA, the sanction for casting a provisional ballot as an ineligible voter is that the ballot does not count. *See* 52 U.S.C. § 21082(a)(4). This system aggressively policies eligibility, and many provisional ballots are not counted. *See* MIT Election Data + Science Lab, *Provisional ballots*, https://electionlab.mit.edu/research/provisional-ballots ("[A]pproximately 1.5 million provisional ballots were issued in the 2018 federal election;

approximately 970,000 were counted, at least in part, and approximately 385,000 were rejected."). Here, that system worked just as it should—Ms. Mason's ballot was not counted. RR3.Ex.6.

Moreover, by characterizing use of the provisional ballot system as a potential crime, Ms. Mason's prosecution has serious negative repercussions for voting. Provisional ballots are a safeguard to ensure that eligible voters are not turned away at the polls. *See* H.R. Rep No. 107-329 at 37 (2001) ("In-precinct provisional voting enables people whose eligibility is in doubt to vote in their precinct . . . and have their registration verified in the days following an election. . . . [P]rovisional voting . . . represents the ultimate safeguard to ensuring a person's right to vote."); *see also, e.g.*, Matt Vasilogambros, *Provisional Ballots Protect Voting Rights—When They Are Counted*, The Pew Charitable Trusts (Nov. 16, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/11/16/-provisional-ballots-protect-voting-rights-when-they-are-counted.

Ms. Mason's prosecution sends the troubling message that casting a provisional ballot carries a serious risk, with a consequent chilling effect on the use of provisional ballots.[3] Such chilling is likely to disproportionately impact minority

[3] Notably, this deterrent effect layers on top of the already confusing and complex American electoral system. *See supra* at 15-16; *see also, e.g.*, Editorial Board, *Voting Should Be Easy. Why Isn't It?*, N.Y. Times (Oct. 18, 2018), https://www.nytimes.com/2018/10/18/opinion/registration-vote-midterms.html; Kira Lerner, *The Powerful Role Confusion Plays In American Elections*, Talking

voters, who tend to cast more provisional ballots. *See* Christopher McGinn & Keith G. Debbage, *The Electoral Geography of Provisional Ballots by County*, 55 Southeastern Geographer 293, 304 (2015), https://www.jstor.org/stable/26233742 ("Counties with disproportionately large white populations tended to cast fewer provisional ballots per 1,000 relative to more racially diverse counties. Such a finding supports much of the existing literature that suggested a connection existed between provisional ballots and racial composition."); Joshua Field et al., *Uncounted Votes: The Racially Discriminatory Effects of Provisional Ballots*, Center for American Progress at 2 (Oct. 2014), https://cdn.americanprogress.org/wp-content/uploads/2014/10/ProvisionalBallots-report.pdf (finding "statistically significant correlations" between minority voting-age population and the number of provisional ballots cast at the county level in 16 states).

Ms. Mason's case also reflects a disturbing abuse of discretion in its extreme selectivity, in multiple respects. To date, illegal voting prosecutions nationally and in Texas have almost uniformly targeted intentional voter fraud—not the casting of a ballot, let alone the submission of a provisional ballot, by an individual who turns

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Points Memo (Dec. 28, 2018), https://talkingpointsmemo.com/feature/the-powerful-role-confusion-plays-in-american-elections; Emily Rong Zhang, *New Tricks for an Old Dog: Deterring the Vote Through Confusion in Felon Disenfranchisement*, 84 Mo. L. Rev. (2019), https://scholarship.law.missouri.edu/mlr/vol84/iss4/7/; Texas Secretary of State, *FAQ*, https://www.votetexas.gov/faq/index.html (frequently asked questions showing the complexities of voting in Texas).

out to be incorrect about their eligibility to vote. According to the Heritage Foundation's database tracking election fraud cases across the United States, there are no known cases of voter fraud prosecution for the ultimately incorrect submission of a provisional ballot except this one, and virtually all known prosecutions involve intentional misdeeds. *See* https://www.heritage.org/voterfraud-print/search (full database); https://www.heritage.org/voterfraud/search?state=TX (Texas prosecutions, including 21 instances of "ineligible voting" since 2009).

Not only is Ms. Mason's conduct an invalid basis for prosecution, but the penalty imposed on her—five years in prison, *see* CR 33—is significantly higher than in many intentional voter fraud cases. For example, in the same county where Ms. Mason was convicted, a Justice of the Peace who admitted to submitting fake signatures to get on the primary ballot received five years' probation. Gillian Edevane, *Judge Gets Probation for Voter Fraud in Same County Where Woman Got Five-year Prison Term for Voting Illegally*, Newsweek (Apr. 24, 2018), https://www.newsweek.com/judge-gets-probation-election-fraud-county-woman-got-five-years-prison-texas-899147. In Fort Worth, a precinct chairwoman candidate who arranged for her son to vote under his father's name was sentenced only to probation. Mitch Mitchell, *Grand Prairie woman guilty of voter fraud*, Fort Worth Star-Telegram (Feb. 8, 2017), https://www.star-telegram.com/news/-

local/fort-worth/article131520964.html. In The Woodlands, after a group of 10 individuals temporarily moved into a Residence Inn to claim it as their voting address so they could vote in a local election for a district in which they did not live, several members of the group received only probation. Jennifer Summer, *Remaining Woodlands RUD voter receives probation for election fraud*, The Courier (May 24, 2018), https://www.yourconroenews.com/neighborhood/moco/news/article/-Remaining-Woodlands-RUD-voter-receives-probation-12944502.php. (Two of these individuals were the defendants in the *Jenkins* and *Heath* cases cited by the court of appeals. *See supra* at 11.) In Harris County, a poll worker who pled guilty to forging her daughter's signature on a ballot served one day in prison. Mihir Zaveri, *Two poll workers plead guilty to illegal voting*, Houston Chronicle (May 23, 2017), https://www.houstonchronicle.com/news/houston-texas/houston/article/-Two-poll-workers-plead-guilty-to-illegal-voting-11165525.php. And in Galveston, a man who pled guilty to voting absentee in two states in the 2012 general election was fined $4,000. Pioneer Press, *He voted in Anoka County and Texas, then bragged on Facebook*, Twin Cities (June 4, 2014), https://www.twincities.com/-2014/06/04/he-voted-in-anoka-county-and-texas-then-bragged-on-facebook-2/.

Ms. Mason's sentence of five years in prison—all for submitting a provisional ballot when she incorrectly believed she was eligible to vote, which was never counted—

stands in sharp contrast to the sentences imposed in these cases of intentional voter fraud.

Other features of this prosecution are also concerning. Ms. Mason was "report[ed]" to the authorities by her neighbor, an election judge of a different political party, after the neighbor "helped" her vote. *See Mason*, 598 S.W.3d at 785-86.[4]

Finally, Ms. Mason was singled out from thousands of people for a technical violation. In the 2016 General Election, 67,273 provisional ballots were submitted in Texas, of which 54,850 provisional ballots were rejected, with 44,046 rejected due to not being registered in the precinct. *See* Appellant Br. at 42. In Tarrant County (where Ms. Mason was prosecuted), 3,990 of the 4,463 provisional ballots submitted were rejected, 3,942 for not being registered in the precinct. *Id.* Yet Texas has prosecuted exactly ***one*** person for illegally submitting a provisional ballot in the 2016 General Election—Crystal Mason. She has been treated differently than every other one of the tens of thousands of Texans who were ultimately incorrect about their ability to vote in the 2016 election.

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[4] *See also* Sam Levine, *Texas Made an Example Out of Crystal Mason – For Trying to Vote*, Huffington Post (July 29, 2019), https://www.huffpost.com/entry/crystal-mason-prison-sentence_n_5d3b04e8e4b0c31569e9fb94 ("According to Diederich, after confirming Mason wasn't on the voter rolls, he began helping her fill out a provisional ballot affidavit. . . . Eventually—he says he can't remember why—he decided to contact the Tarrant County district attorney.").

For all the reasons just given, the instant prosecution is wholly at odds with the fundamentals of the prosecutorial mandate. Fortunately, the illegal voting statute, properly interpreted, does not allow such abuse.

CONCLUSION

For the foregoing reasons, Ms. Mason's request that the Court reverse the decision of the court of appeals, reverse her conviction, and order a judgment of acquittal should be granted.

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Dated: July 22, 2021

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**Pro Hac Vice Application Pending*

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief satisfies the word-limit requirements for amicus briefs contained in the Texas Rules of Appellate Procedure, because it contains a total of 5,202 words, excluding the portions that can be excluded pursuant to those same rules.

/s/ Neal S. Manne
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CERTIFICATE OF SERVICE

I hereby certify that, on July 22, 2021, a true and correct copy of the foregoing was served via electronic mail on the following counsel of record for all parties in this case:

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No. PD-0881-20

IN THE
COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

CRYSTAL MASON,

Appellant,

v.

STATE OF TEXAS,

Respondent.

From the Second Court of Appeals,
Cause No. 02-18-00138-CR

Trial Court Cause No. 148710D
From the 432nd District Court of Tarrant County, Texas
The Honorable Ruben Gonzalez, Jr. Presiding

DECLARATION OF JULIE VEROFF

I, Julie Veroff, declare under penalty of perjury of the laws of the United States of America that the following is true and correct, and state:

1. I am an attorney with the law firm Cooley LLP, counsel of record for *amici curiae* former prosecutors supporting Appellant. The following is true of my own personal knowledge, and, if called as a witness, I would and could testify competently thereto.

2. As set forth below, I have reviewed the audio recording and provided a transcript of Representative Briscoe Cain's testimony regarding the Conference Committee Report for Senate Bill 7 delivered in the Texas House of Representatives on May 30, 2021. The transcript is accurately described in the respective Exhibit and transcribed to the best of my ability. The transcript contains timestamps of Representative Cain's testimony as available in the hyperlink provided below. As of the date of this filing, the hyperlink is in working order.

3. Attached hereto as Exhibit A is a true and correct transcription of testimony by Representative Briscoe Cain heard in the Texas House of Representatives on May 30, 2021. A recording of the testimony is available at: https://www.youtube.com/watch?v=KzrmGJIr87A.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on July 21, 2021

/s/ Julie Veroff
Julie Veroff

EXHIBIT A

Texas House of Representatives

DATE: May 30, 2021

DESCRIPTION: Excerpts of Representative Briscoe Cain's testimony on the Conference Committee Report on Senate Bill 7 delivered in the Texas House of Representatives.

TIME STAMP: 8:50:30-8:53:19

AVAILABLE AT: https://www.youtube.com/watch?v=KzrmGJIr87A

TESTIMONY:

Section 1.05 mandates that election officials and public officials strictly construe the election code to effect the intent of the Legislature, which is found in section 1.04, which provides that the application of this Code and the conduct of elections be uniform and consistent throughout the State to reduce the likelihood of fraud in the conduct of elections, protect the secrecy of the ballet, promote voter access, and ensure that all legally cast ballots are counted.

I see Representative Bucy there. Due to time restrictions, I'm going to jump to article 9 of the bill, which begins on page 61.

These sections were drafted to give effect to the intent of the floor amendment number 7 by Representative Bucy. Sections 9.01 and 9.02 are made to ensure that persons 18 years of age or older who are convicted of a felony are fully informed of the conviction's effect on their rights of suffrage. While section 9.03 also contains a new code provision from the House version of this bill, found under subsection A5

(which outlaws voting in a federal election held on the same date in this state and another state), subsection C was intentionally and specifically added to clarify what some courts and local prosecutors have gotten wrong: The crime of illegal voting is intended to target those individuals who intentionally try to commit fraud in our elections by voting when they know they are not eligible to vote. It is not intended to target people who make innocent mistakes about their eligibility, that are facilitated solely by being provided a provisional ballot by a judge, since federal law requires judges to give someone who isn't registered in request [sic] to vote a ballot.

To this end, this provision in the Conference Committee Report says that filling out a provisional ballot affidavit is not enough to show that a person knew they were ineligible to vote. For the purpose of legislative intent, this does not actually change existing law, but rather it makes crystal clear that under current law, when an individual fills out a provisional ballot, like tens of thousands of Texans do every year, the mere fact that they filled out and signed a provisional ballot affidavit is not enough to show that an ineligible voter knew they were ineligible to vote, or that their signature on it is enough. That has always been the case. Again, no one should be prosecuted solely on the basis of filling out a provisional ballot affidavit.

We also, as part of the conference committee report, discuss recommending to the Secretary of State that these disclaimers about whether or not a person should fill this out be printed larger and more clearly on provisional ballots, since we can't

put our election judges in the position of asking voters questions about their status and making legal decisions.

Thus, for purposes of legislative intent, we ask the Secretary of State make the relevant text on the provisional ballot affidavit larger, and more conspicuous. In total, these provisions strike a balance between allowing the prosecution of people that intentionally vote illegally, while ensuring that people who in good faith cast a provisional ballot, but turn out to be mistaken, cannot and should not be prosecuted. Such a prosecution, should one occur in the future or have occurred in the past, would in my opinion be a grave error.

Automated Certificate of eService

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